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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

DEWAYNE DEAN LEWIS,

Defendant and Appellant.

C076707

(Super. Ct. No. CRF121637)

An amended indictment charged defendant Dewayne Dean Lewis with six counts of conspiracy to sell methamphetamine (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11379, subd. (a)—counts 5, 7, 9, 13, 17, 18),¹ six counts of selling methamphetamine (Health & Saf. Code, § 11379, subd. (a)—counts 6, 10, 11, 12, 16, 19),² one count of offering to sell methamphetamine (count 8), and six counts of

¹ Undesignated statutory references are to the Penal Code.

² During the trial, count 11 was dismissed as being a duplicate of count 10.

participation in a criminal street gang (§ 186.22, subd. (a)—counts 33 to 38). In connection with the conspiracy and sales counts (counts 5 to 13, 16 to 19), it was alleged that defendant committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members (§ 186.22, subd. (b)(1)). It was further alleged that defendant had served a prior prison term (§ 667.5, subd. (b)).

Eleven other defendants were charged in the amended indictment. Defendant and codefendants Robert Steven Montoya, Esiquiel Zeke Butcher and Guillermo Duke Rosales were tried together. The jury convicted defendant on all conspiracy and offer/sales counts but acquitted him on all gang charges and gang enhancements. The jury acquitted codefendants Butcher and Rosales on all charges against them. The jury convicted codefendant Montoya on all conspiracy and sales counts with which he was charged but acquitted him on all gang charges and gang enhancements.³ The trial court found defendant's prior prison term allegation to be true.

The trial court sentenced defendant to state prison for an aggregate term of nine years. The court imposed a total of eight years on the offer/sales counts, added one year for the prior prison term, and stayed sentence on all of the conspiracy counts.

Defendant appeals. He contends all of his conspiracy convictions (counts 7, 9, 13, 17, & 18) save one (count 5), must be reversed. He argues that had the jury been properly instructed to determine whether there was a single conspiracy or multiple conspiracies, it is reasonably probable it would have found only one, overarching conspiracy. He claims all sales and the offer to sell involved "one or more of the same coconspirators, occurred during the same time period, involved the same modus operandi, and had the [] sale of methamphetamine as the[] objective." In the alternative, defendant

³ Codefendant Montoya appealed in case No. C076708.

argues that since “the conspiracies charged in Counts 7, 9, 13, 17 and 18 are necessarily included in the overarching conspiracy charged in Count 5,” insufficient evidence supports his conviction on those five counts. Citing Penal Code section 954 and *People v. Coyle* (2009) 178 Cal.App.4th 209, 217 (*Coyle*), defendant further claims that the bar against multiple convictions for the same offense requires that the five counts be reversed because they are necessarily included in count 5.

The People initially agreed with defendant that the evidence supports a finding of only a single conspiracy as opposed to multiple conspiracies and that the bar against multiple convictions for the same offense requires reversal of counts 7, 9, 13, 17, and 18. However, in a supplemental letter brief, prompted by the court’s request for additional briefing on the sufficiency of the evidence to support the single conspiracy alleged in count 5, the concession was withdrawn and the People now contend that the evidence is insufficient.

Thus, whether sufficient evidence supports the jury’s verdict is now open to question. The prosecutor’s theory at trial was that the individual conspiracies and drug sales charged were interdependent, parts of a joint drug enterprise between gang members together comprising count 5, the “big” conspiracy. However, the jury’s verdicts lay waste to the gang aspects of that theory. The jury acquitted defendant, an alleged gang member, on all gang charges and did not find any of the gang enhancements to be true. The jury acquitted codefendants Butcher and Rosales, also alleged gang members, on all charges against them and also acquitted codefendant Montoya, another alleged gang member, on all gang charges and did not find any of the gang enhancements to be true.

The People urge that “[w]ithout a favorable finding on the gang allegations, there was no link connecting the five individual conspiracies into one overarching conspiracy.” Defendant argues the gang allegations merely provided a motive for the conspiracy and are not an essential element of it. Neither argument is compelling. The prosecution’s

conspiracy claim would have been advanced by establishing a common gang connection and motive. But an agreement to commit criminal acts, an essential element of the grand conspiracy charged in count 5, is not solely the domain of gang members. Even if the individuals charged were not gang members, they could still all agree to commit the acts alleged. But there is no substantial evidence to establish that they did, and in its absence, we must reverse defendant's conviction on that count.

FACTS

In 2011 and 2012, the Yolo County Narcotic Enforcement Team (YONET) conducted an investigation (Operation Red Sash) of a criminal street gang known as the Broderick Boys. On December 8, 2011, YONET Agent Gary Richter, acting undercover, sent a text message to defendant stating that he wanted to purchase methamphetamine. Later that day, they met at an apartment complex located at 600 West Capitol Avenue (Capitol complex). At some point, the agent stated he wanted to buy \$100 worth of methamphetamine. The agent and defendant agreed to buy and split an eighth of an ounce. Defendant did not have the methamphetamine on his person but indicated he could obtain it in Woodland from his cousin, Valentino Lorenzo Castanon. After defendant called to get directions, defendant and the agent drove to Woodland in the agent's car and stopped at an apartment complex off of East Oak Avenue. Defendant got out of the car, met with his cousin, Castanon, and returned to the agent's car with the methamphetamine. On the drive back to West Sacramento, defendant sold 1.3 grams to the agent who dropped defendant off at the Capitol complex. **(Count 6 [sale of methamphetamine] convicted; count 7 [conspiracy to sell methamphetamine] convicted; count 33 [participation in a criminal street gang] acquitted; gang enhancements attached to counts 6 and 7, not true.)**

On December 14, 2011, the agent sent a text message to defendant stating that he wanted to purchase methamphetamine. As instructed, the agent went to the Capitol complex to pick up defendant. Andrew Thomas Vandyke was with defendant and they

both got into the agent's car. Defendant instructed the agent to drive to Denny's on J Street in Sacramento. The agent gave defendant \$200. Upon arrival, defendant got out and talked on his cell phone until a car driven by a woman pulled into the parking lot. Defendant got into the woman's car. Defendant got out and then into the agent's car as the woman drove out of the lot. Defendant showed the agent a bag of suspected methamphetamine which appeared to be an eighth of an ounce. Defendant instructed the agent to drive back to the Capitol complex. Upon arrival at the complex, defendant and Vandyke got out and went into an apartment. A few minutes later, defendant returned with a baggie of suspected methamphetamine which he handed to the agent. Defendant stated his "family" was manufacturing a batch of methamphetamine and the agent could buy seven ounces if he needed it. The agent later discovered that the suspected methamphetamine he had purchased that day was a fake substance. **(Count 8 [offer to sell methamphetamine] convicted; count 9 [conspiracy to sell methamphetamine] convicted; count 34 [participation in criminal street gang] acquitted; gang enhancements attached to counts 8 and 9, not true.)**

On January 11, 2012, the agent sent a text message to defendant and met defendant at the Capitol complex. The agent complained about the fake substance and defendant apologized. Defendant had methamphetamine on his person and sold 0.3 grams of methamphetamine to the agent for \$50. **(Count 10 [sale of methamphetamine] convicted; count 35 [participation in criminal street gang] acquitted; gang enhancement attached to count 10, not true.)**

On February 21, 2012, the agent sent a text message to defendant stating that he wanted to purchase methamphetamine. The agent and his undercover partner met defendant in the back parking lot of the Capitol complex. They discussed purchasing ounces of methamphetamine and defendant indicated it would be \$700 to \$800 per ounce. The agent wanted to purchase \$100 worth of methamphetamine as a "taste" test. Defendant did not have any on his person. He believed he could obtain it later that night

but he had trouble delivering it. Defendant had a parole curfew so he had his uncle, Christopher John Castro, Sr., accompany the agent and his partner in the agent's car to a house on Main Street. Castro went into the house and returned with Michael Timothy Morales. After the agent introduced himself to Morales, Castro and Morales returned to the house. A short time later, Castro returned to the car with a baggie containing one gram of methamphetamine. The agent purchased the methamphetamine for \$100 and then drove away, leaving Castro at the house. **(Count 12 [sale of methamphetamine] convicted; count 13 [conspiracy to sell methamphetamine] convicted; count 36 [participation in criminal street gang] acquitted; gang enhancements attached to counts 12 and 13, not true.)**

On March 15, 2012, the agent sent a text message to defendant stating that his partner wanted to buy a large amount of methamphetamine. Later that evening, the agent and his partner met defendant at Sal's Taco, a restaurant located at 400 C Street. Defendant was high and had been up for two days. The agent's partner and defendant agreed on half an ounce for \$400. Defendant did not have that amount on his person. He made a call on his cell phone. He said his new connection would deliver, noting that his prior Citrus Heights' connection had been arrested. About 10 minutes later, a light-skinned Hispanic or white male, allegedly Butcher, arrived in a silver (or gold) Lexus. After defendant met with Butcher outside, defendant went inside the taco shop and asked for the money. The agent wanted to inspect the methamphetamine first. The Lexus left. Defendant showed the agent some methamphetamine from another source that he said was better. About 10 minutes later, the Lexus returned and defendant met the driver outside and the agent and his partner went to the agent's car. Defendant then went to the agent's car and handed him a bag containing 10.24 grams of methamphetamine. The agent's partner gave \$400 to defendant. **(Count 16 [sale of methamphetamine] convicted; count 17 [conspiracy to sell methamphetamine] convicted; count 37**

[participation in criminal street gang] acquitted; gang enhancements attached to counts 16 and 17, not true.)

On March 19, 2012, the agent sent a text message to defendant stating that he wanted to purchase methamphetamine. The agent wanted \$100 worth. After meeting at Sal's Taco, they went to a location on B Street to wait for defendant's cousin "Rob" to deliver the methamphetamine. Defendant did not have any methamphetamine on his person, explaining he was in debt for \$80 and his roommate had smoked the rest of his methamphetamine. Defendant needed to pay the debt before he could get more methamphetamine. While they waited, the agent stated that he wanted to purchase a gun and defendant said he did not do that but he might be able to find someone to assist the agent in his purchase. About 20 minutes later, Montoya arrived in a white Dodge Intrepid followed by Rosales in a black Mercedes-Benz. Defendant got into the Intrepid. Rosales got out, opened the trunk of his own car, obtained some unidentified object, and then got back into his car. Defendant returned to the agent's car and handed him a baggie with methamphetamine and the agent gave defendant \$20 for the drugs and \$80 as a down payment for a gun and to help defendant cover his debt. Defendant returned to Montoya's car. **(Count 18 [conspiracy to sell methamphetamine] convicted; count 19 [sale of methamphetamine] convicted; count 38 [participation in criminal street gang] acquitted; gang enhancements attached to counts 18 and 19, not true)**

Count 5 charged defendant and 11 codefendants with conspiracy to sell methamphetamine from December 1, 2011, through April 24, 2012.⁴ Count 5 set forth 45 overt acts. Overt acts 1 through 10 were the same overt acts set forth in count 7 which charged defendant and Castanon with conspiracy to sell methamphetamine on

⁴ In addition to Castro, Morales, Butcher, Montoya, Vandyke, Castanon, and Rosales, the four other codefendants were Joseph Jeffrey Freed, Jason William Swearingin, Eugene William Espinoza, and Naomi Marcelina Castro.

December 8, 2011. Overt acts 11 through 17 were the same as the overt acts set forth in count 9 which charged defendant and Vandyke with conspiracy to sell methamphetamine on December 14, 2011. Overt acts 18 through 23 were the same as the overt acts set forth in count 13 which charged defendant, Castro, and Morales with conspiracy to sell methamphetamine on February 21, 2012. Overt acts 24 through 33 were the same as the overt acts set forth in count 17 which charged defendant and Butcher with conspiracy to sell methamphetamine on March 15, 2012. Overt acts 34 through 42 were the same as the overt acts set forth in count 18 which charged defendant, Montoya, and Rosales with conspiracy to sell methamphetamine on March 19, 2012.⁵ **(Count 5 [conspiracy to sell methamphetamine] convicted; gang enhancement, not true.)**

Based on the gang expert testimony, the prosecutor argued that the coconspirators were members of the Broderick Boys and that defendant, also a member of the Broderick Boys, sold drugs with the assistance of other members of the same gang, and argued the charged sales and offer to sell were part of an ongoing criminal enterprise by the gang. “[O]ne very large conspiracy to sell methamphetamine that encompasses all of the defendants [¶] [O]ne big, large conspiracy. The Court read you all of the overt acts and all of the smaller conspiracies combined.” In acquitting all defendants on all gang charges and finding none of the gang enhancements to be true, the jury rejected the prosecutor’s argument that the conspiracies and sales were gang crimes or gang related.

DISCUSSION

A conspiracy is an agreement by two or more persons to commit any crime. (§§ 182, subd. (a)(1), 184.) “A conviction of conspiracy requires proof that the defendant

⁵ Overt act 43 related to Naomi Castro and Swearingin and stated that on April 24, 2012, they possessed methamphetamine and a loaded firearm. Overt act 44 related to Naomi Castro, Swearingin, and Freed, and stated that on April 24, 2012, they possessed an assault weapon. Overt act 45 related to Espinoza and stated that on April 24, 2012, he possessed ammunition. The jury was not read overt acts 43 through 45.

and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act ‘by one or more of the parties to such agreement’ in furtherance of the conspiracy.” (*People v. Morante* (1999) 20 Cal.4th 403, 416.)

“ ‘In a conspiracy, the agreement to commit an unlawful act is not criminal until an overt act is committed, but when this happens and the association becomes an active force, it is the agreement, not the overt act, which is punishable’ [Citations.]” (*People v. Jones* (1986) 180 Cal.App.3d 509, 516, italics omitted.) “ ‘One agreement gives rise to only a single offense, despite any multiplicity of objects.’ ” (*People v. Lopez* (1994) 21 Cal.App.4th 1551, 1557 (*Lopez*).)

Conspirators rarely commit their agreements to writing or even express them verbally. Direct proof is often lacking, but a tacit agreement can be inferred from the actions of the participants and the surrounding circumstances. We must determine whether there is sufficient evidence in the record to establish the agreement that is essential to the creation of a conspiracy. In considering the sufficiency of the evidence, we ask “ ‘whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.’ . . . Evidence, to be ‘substantial’ must be ‘of ponderable legal significance . . . reasonable in nature, credible, and of solid value.’ [Citations.]” (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

Substantial evidence supports the individual conspiracies. The evidence supports the jury’s conclusion that different people agreed with defendant to sell or offer to sell methamphetamine to the agent and committed an overt act in the furtherance of the conspiracy. And indeed defendant does not challenge the sufficiency of the evidence to support the individual conspiracies. Rather, he asserts the individual agreements were part of and subsumed within a larger scheme by the individual participants and others to commit the crimes that were charged in the individual counts. He claims that had the jury been correctly instructed, it would have so found. However, if we find no substantial

evidence supports the larger conspiracy count, we need not reach the instruction issue. Thus what is disputed is whether there is substantial evidence to support the larger conspiracy charged in count 5.

“[W]here the evidence shows that a group of conspirators agreed to commit a number of different crimes incidental to a single objective, there is only one conspiracy, and the convictions for multiple conspiracies cannot be sustained.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1133; see *Lopez, supra*, 21 Cal.App.4th at pp. 1557-1559.)

The People assert that the prosecution’s theory in support of count 5 rested on the testimony of a gang expert that the defendants named in count 5 were all active members of a West Sacramento criminal street gang that had drug sales as one of its main activities and all the sales charged in this case were related to that gang, no matter the individual supplier, because that gang controlled the sale of methamphetamine in West Sacramento. In finding defendant not guilty on gang charges and finding the gang enhancements relating to the conspiracy charges untrue, the jury found there was no evidentiary link connecting the five individual conspiracies and the overarching conspiracy and thus insufficient evidence to support the allegations in count 5.

Certainly the not-guilty findings cast doubts on the prosecution’s theory at trial; the People’s case in support of count 5 would rest on far firmer footing had the jury findings been otherwise. But setting questions of gang involvement aside, and focusing on the ultimate question of whether the evidence “shows that a group of conspirators agreed to commit a number of different crimes incidental to a single objective,” the answer is no. Regardless of whether one attaches the same significance to the jury’s not-guilty findings as the People do, there is not sufficient evidence in the record to support the conspiracy alleged in count 5.

The present case does not at all resemble cases in which a single conspiracy has been found. “To determine if the evidence supports finding a single conspiracy (that is to say, a single general agreement), courts have looked for (1) a common goal,

(2) interdependence among the participants, and (3) overlap among the participants.” (*U.S. v. Portela* (1st Cir. 1999) 167 F.3d 687, 695, fn. omitted.) In determining whether there is interdependence among the participants, the question is “ ‘whether the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme.’ [Citation.]” (*Id.* at p. 695.)

Multiple conspiracies exist, however, when the evidence demonstrates no interdependence among the participants and demonstrates separate agreements, each having a distinct, illegal end with no drawing of all together in a single, comprehensive plan. (*Blumenthal v. United States* (1947) 332 U.S. 539, 558-559 [92 L.Ed. 154, 168-169] (*Blumenthal*); *Kotteakos v. United States* (1946) 328 U.S. 750, 754-755 [90 L.Ed. 1557, 1561] (*Kotteakos*); *People v. McLead* (1990) 225 Cal.App.3d 906, 920; *People v. Elliott* (1978) 77 Cal.App.3d 673, 684-685.)

Here, instead of an overall plan to support a single conspiracy, the evidence supports a series of separate conspiracies over an extended period of time with several different factors. The evidence was simply that defendant had methamphetamine to sell or knew how to acquire it to sell and that he conspired with several others at certain times to obtain it and sell it to the undercover agents.

The facts here are similar to those in *Kotteakos* where a broker arranged fraudulent loans with several borrowers, none of whom were connected, and presented several conspiracies, like a wheel with spokes meeting at the center hub (the broker/defendant) without a rim enclosing the spokes. (*Kotteakos, supra*, 328 U.S. at pp. 752-755.) The facts in *Kotteakos* were summarized in *Blumenthal, supra*, 332 U.S. at p. 558: “[E]ach separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another’s loan. The conspiracies therefore were distinct and disconnected, not

parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan.”

The five individual conspiracies which comprised count 5 involved different combinations of conspirators. Common to all the individual conspiracies and sales was only one person, defendant. Each sale occurred on a different date. Each sale began with a text message from the undercover agent to defendant. Prior to the agent’s text message, it could not be foreseen that defendant would be selling or trying to arrange with others to sell methamphetamine. Each sale occurred in a different manner. On December 8, 2011, defendant had the agent drive him to Woodland where defendant obtained the methamphetamine from Castanon. Defendant then sold the drugs to the agent on the drive back to the Capitol complex. On December 14, 2011, defendant got in the agent’s car with Vandyke, had the agent drive to Sacramento where defendant met a woman in a restaurant parking lot and then drive back to the Capitol complex, where defendant and Vandyke went into an apartment. Defendant returned to the agent’s car and sold him a fake substance. On January 11, 2012, the agent complained about the fake substance and defendant, alone, sold methamphetamine to the agent. On February 21, 2012, defendant planned to sell the drugs to the agent but did not have it on his person. He could get it later, but because of his curfew, arranged to have Castro provide it. Castro had the agent drive to a house where Morales came to the car to meet the agent. Castro went into the house then returned to the agent’s car with the methamphetamine. On March 15, 2012, the agent and his partner met defendant at a taco shop where defendant made a phone call. Defendant spoke with the driver of a Lexus who arrived and returned to the taco shop, asking for the money. When the agent demanded to see the drugs first, the Lexus left and returned 10 minutes later. Defendant spoke with the driver of the Lexus then defendant delivered the drugs to the agent who was waiting in his car. On March 19, 2012, although defendant and the agent met at the taco shop, they left and went to a

location on B Street to wait for Montoya to deliver the drugs. Defendant also indicated he could find someone to assist the agent in the purchase of a gun. Montoya arrived in one car followed by Rosales in another car. Defendant got in Montoya's car then defendant returned to the agent's car with the methamphetamine. After the agent paid, defendant returned to Montoya's car. Contrary to defendant's claim, the transactions were not executed in a similar manner.

Certainly the jury did not find any of the evidence of interdependence among the participants (such as the gang expert's testimony) to be persuasive, having rejected all of the gang charges and gang enhancements against all of the defendants. And there is no other evidence suggesting the drug sales "were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate [drug sale] had its own distinct, illegal end. Each [drug sale] was an end in itself, separate from all others, although all were alike in having similar . . . objects. Except for [defendant], the common figure, no conspirator was interested in whether any [drug deal] . . . went through. And none aided in any way, by agreement or otherwise, in [selling the drugs on the other occasions]. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme There was no drawing of all together in a single, over-all, comprehensive plan." (*Blumenthal*, *supra*, 332 U.S. at p. 558.)

Simply, the "big" umbrella conspiracy (count 5) is not supported by the evidence. Thus, we affirm counts 7, 9, 13, 17, and 18 but reverse count 5.⁶

⁶ While agreeing with this ultimate conclusion, our concurring colleague disagrees with "the . . . suggestion that the jury's verdicts on the gang charges and gang enhancements have *anything* to do with that ultimate conclusion." She disagrees "because inconsistent verdicts on other counts do not invalidate (or affect in any way) an otherwise supported count of conviction." Truly, jury verdicts need not always be consistent. But that rule has no application to this case. There is no inconsistency between the verdicts rendered by the jury in this case. (See generally, Muller, *The Hodgoblin of Little Minds? Our*

We reject defendant's argument that the conspiracies charged in counts 7, 9, 13, 17, and 18 are "necessarily included in the overarching conspiracy charged in count 5" "In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether 'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' [Citation.]" ' [Citation.] In other words, 'if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034 (*Montoya*)). Count 7 charged defendant with conspiracy to sell methamphetamine to the agent on December 8, 2011, and listed 10 overt acts. Count 5, which listed an additional 35 overt acts, could be committed without selling methamphetamine to the agent on December 8, 2011. The jury had to find unanimously that " 'an overt act was done in furtherance of the conspiracy, not in finding a particular overt act was done.' [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1133.) "We do not doubt that the requirement of an overt act is an element of the crime of conspiracy in the sense that the prosecution must prove it to a unanimous jury's satisfaction beyond a reasonable doubt." (*Id.* at p. 1134.) Count 7 is

Foolish Law of Inconsistent Verdicts (1998) 111 Harv.L.Rev 771.) As we point out, a conspiracy simply requires an agreement to commit criminal acts; such an agreement "is not solely the domain of gang members."

The point of the concurring opinion seems to be that, notwithstanding its verdict on the gang allegations, the jury nonetheless could have considered the gang evidence in determining appellant's guilt of the grand conspiracy alleged in count 5, and so might we in assessing the sufficiency of evidence in support of the conspiracy. Perhaps, but when given an opportunity to do so in supplemental briefing and at oral argument, the People made no effort to support the conspiracy count by citation to gang evidence. And as we conclude, and our concurring colleague agrees, there is not sufficient evidence in the record to support the grand conspiracy verdict on that or any other basis. No purpose is served by debate on whether the outcome would differ had the jury reached a different verdict on the gang allegations.

not necessarily included in count 5. The same can be said for all the other individual conspiracy counts.

We also reject defendant's claim that his "convictions on the date specific conspiracies cannot stand because they violate the bar against multiple convictions for the same offense." He misplaces his reliance upon section 954 and *People v. Coyle* (2009) 178 Cal.App.4th 209 as did the People in their initial response.

"In California, a single act or course of conduct by a defendant can lead to convictions 'of *any number* of the offenses charged.' [Citations.]" (*Montoya, supra*, 33 Cal.4th at p. 1034, citing § 954.) In *Coyle*, the defendant killed a drug dealer and was charged and convicted of three counts of murder under different theories—murder with the special circumstance that the murder was committed during a burglary, murder with the special circumstance that the murder was committed during a robbery, and second degree murder. (*Coyle, supra*, 178 Cal.App.4th at p. 211.) "[M]ultiple charges and multiple convictions can be based on a single criminal act, if the charges allege separate offenses." [Citations.]" (*Id.* at p. 217.) But the defendant in *Coyle* was "charged [with] a single offense: murder" and the "three counts simply alleged alternative theories of the offense." (*Ibid.*) *Coyle* has no application here.

Counts 7, 9, 13, 17, and 18 charged separate offenses, conspiracy to sell or offer to sell, on different dates. Count 5 alleged an alternative theory—a single, all-encompassing conspiracy—which finds no support in the record.

Defendant argues that the jury would have found only one overarching conspiracy had it been properly instructed. In support he cites *People v. Jasso* (2006) 142 Cal.App.4th 1213 (*Jasso*). However, as we have explained, there was not sufficient evidence from which a jury could have found a single overarching conspiracy. The instructional issue at the heart of the *Jasso* case is of no consequence here.

DISPOSITION

Defendant's conviction for conspiracy on count 5 is reversed. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RAYE, P. J.

I concur:

MAURO, J.

DUARTE, J., Concurring.

I agree with the majority's ultimate conclusion that defendant's conviction on count 5 is not adequately supported by the evidence presented at trial. I am compelled to write separately, however, because I disagree with the majority's suggestion that the jury's verdicts on the gang charges and gang enhancements have *anything* to do with that ultimate conclusion. In my view, the jury's verdicts on other counts and enhancements are not at all relevant to our analysis of the sufficiency of the evidence supporting count 5.

Also not relevant, despite the majority's suggestion to the contrary (see *ante*, fn. 6), is the Attorney General's decision not to defend the sufficiency of the evidence on count 5 after receiving this court's supplemental briefing order. Her concession that the evidence is insufficient is apparently based on her view that "[w]ithout a favorable finding on the gang allegations, there was no link connecting the five individual conspiracies into one overarching conspiracy." However, as I discuss below, whether *the jury* credited the gang evidence should not factor into our analysis of the sufficiency of its verdict on count 5. The question is whether *our review* of the *entire record* contains substantial evidence. I write separately to make this point and complete what I feel is the necessary analysis, not to discuss whether the outcome would change had the jury made different decisions. (See *ante*, fn. 6.)

It is well settled that in reviewing the sufficiency of evidence, we ask whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. We resolve neither credibility nor evidentiary issues. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) We will reverse for insufficient evidence only if " " "it appears "that *upon no hypothesis whatever* is there sufficient substantial evidence to support [the conviction]." " " " (*People v. Manriquez* (2005) 37 Cal.4th 547, 577, italics added.)

The majority writes: “The prosecutor’s theory at trial was that the individual conspiracies and drug sales charged were interdependent, parts of a joint drug enterprise between gang members together comprising count 5, the ‘big’ conspiracy. However, the jury’s verdicts lay waste to the gang aspects of that theory.” (*Ante*, p. 3.) The majority later adds: “In finding defendant not guilty on gang charges and finding the gang enhancements relating to the conspiracy charges untrue, the jury found there was no evidentiary link connecting the five individual conspiracies and the overarching conspiracy and thus insufficient evidence to support the allegations in count 5. [¶] Certainly the not-guilty findings cast doubts on the prosecution’s theory at trial; the People’s case in support of count 5 would rest on a far firmer footing had the jury findings been otherwise.” (*Ante*, p. 10.)

I cannot agree to this language, because inconsistent verdicts on other counts do not invalidate (or affect in any way) an otherwise supported count of conviction. Nor do the jury’s apparent conclusions affect *our* review for sufficient evidence. The majority disputes that this case concerns inconsistent verdicts (see *ante*, fn. 6 [“that rule has no application in this case”]), but I disagree. The majority’s analysis suggests that the jury’s apparent inconsistency in acquitting on the gang charges while convicting on the (gang-related) conspiracy somehow undermines the conspiracy conviction. But the acquittal on the gang charges has no effect on the validity of the conspiracy conviction, although the verdicts appear to be inconsistent with one another.

“An acquittal of one or more counts shall not be deemed an acquittal of any other count.” (Pen. Code, § 954.) “The question of the validity of inconsistent verdicts usually arises when a jury renders two verdicts on two different counts which are contradictory. [Citation.] Understandably, in such cases defendants . . . take the position that the acquittal is the legally correct verdict while the conviction is not. This argument has been universally rejected because inconsistent verdicts are probably the result of compromise in the jury room or of an extension of leniency or mercy to the defendant. [Citation.] In other words, if the conviction is supported by substantial evidence, it is valid because the defendant ‘had the benefit of the jury’s compassion, rather than suffering a burden

because of its passion’ [Citations.]” (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656 (*Pahl*).)

An exception to the rule against attacking inconsistent verdicts exists in conspiracy cases in which the overt act alleged in the “conspiracy charge is identical to another charged offense of which the defendant is acquitted.” (*Pahl, supra*, 226 Cal.App.3d at p. 1658.) However, “where there are overt acts alleged in the conspiracy count other than or in addition to the act constituting the substantive offense charged against a defendant in another count, *there is no inconsistency in convicting that defendant of conspiracy but acquitting him of the substantive offense.*” (*People v. Eberhardt* (1985) 169 Cal.App.3d 292, 297, italics added.)

The majority leans heavily on the jury’s acquittals on the gang-related charges and enhancements to deem the evidence supporting count 5 insufficient. As a result, it fails to independently analyze the evidence in the record potentially supportive of the jury’s verdict on count 5. The Attorney General’s analysis is similarly deficient. In my view, the law requires that we perform this analysis independently, without regard to the jury’s findings. It is not merely an unnecessary exercise, or a pointless debate. Our independent analysis of *all* of the evidence contained in the record is required; any reliance on the jury’s acquittals to find its conviction unsound is impermissible.

My review of the expert testimony reveals the gang expert’s opinion that the various defendants were gang members, as well as evidence that some, including Lewis, were former gang members. The expert also testified that the Broderick Boys gang sells drugs, all the charged drug sales benefitted the gang, and all drug sales in Broderick are by the Broderick Boys. The expert suggested, but did not confirm, that all drug sales in West Sacramento are by Broderick Boys. There was no evidence that to be a Broderick Boy one had to sell drugs; the gang also commits violent assaults and possesses firearms illegally. The expert offered no evidence of a *single general agreement* amongst all of the many participants in the smaller charged conspiracies, or evidence of any *interdependency* amongst the participants. Nor was there any testimony that any one sale was necessary or advantageous to the other sales. The prosecutor did not point to any

such over-arching agreement in closing argument, but rather loosely argued only that proof of each of the lesser charged conspiracies and corresponding overt acts equaled proof of the whole. Thus I do not find this evidence sufficient to prove the single overarching conspiracy alleged in count 5.

I make this assessment without considering that “the jury did not find any of the evidence of interdependence among the participants (such as the gang expert’s testimony) to be persuasive, having rejected all of the gang charges and gang enhancements against all of the defendants.” (*Ante*, p. 13.) Rather, when considering the expert’s testimony together with the remainder of the evidence considered by the jury--whether or not it appears the jury found such evidence persuasive--I agree with the majority’s conclusion that there is insufficient “evidence suggesting the drug sales ‘were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end of result.’ ” (*Ante*, p. 13.) Accordingly, I concur in the judgment.

DUARTE, J.